

SOUTH AFRICA / JUDGMENT

Khani v Minister of Safety and Security and Another (735/08)

[2012] ZANCHC 2 (27 January 2012)

[2012] ZANCHC 2

COURT

Northern Cape High Court, Kimberley

BEFORE

L P Tlaetsi

CASE / FILE NUMBER

735/08

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Source record**IN THE HIGH COURT OF
SOUTH AFRICA****[NORTHERN CAPE HIGH
COURT, KIMBERLEY]****CASE NO: 735/08****In the matter**

between:

SIPHO ARNOLD KHANI

.....PLAINTIFF

AND

MINISTER OF SAFETY

AND SECURITY1ST

DEFENDANT

CONSTABLE (V)

TERBLANCHE

.....2ND

DEFENDANT

Date of judgment :

27 January 2012

JUDGMENT

TLALETSI J

Introduction

[1] The plaintiff instituted a claim for damages against the defendants emanating from an incident in which the plaintiff was shot several

times by Second defendant who was at the time acting within the course and scope of her employment with the first defendant.¹ The plaintiff's pleaded case is that Second defendant intentionally and wrongfully shot him seven times and that all the seven shots struck his body and as a result sustained several injuries. The defendants pleaded that about five shots were fired by Second defendant at the plaintiff. They denied that Second defendant acted unlawfully and pleaded that her actions were reasonably necessary in order to effect a lawful arrest; to maintain law and order and to protect her own life and that of other people at the scene.

[2] At the commencement of the trial I ordered with the concurrence of the parties that the merits be separated from quantum in terms of rule 332. The trial thereafter proceeded for the consideration of the issue of liability. In light of the defendants' defence it became common cause that

the defendants carried the duty to begin adducing evidence and to justify the shooting of the plaintiff.³

Factual

Background

[3] The defendants tendered the evidence of the following witnesses. Second defendant,⁴ Sergeant Sarel Jacobs, the police reservist who was in the company of Second defendant and a constable by rank at the time; Insp. Edward Pieter Fortuin, a police officer who attended the scene and drew a sketch plan and key thereto; Capt. Reith Mervyn Rance, a police officer attached to the ballistic section of the Forensic Science Laboratory of the South African Police Services (SAPS); Dr Frederic Du Plessis (an orthopaedic surgeon); Dr Jacob Johannes Dempers (the Forensic Pathologist); Jacobs Steyl (the forensic ballistic expert) and Bongani Conrad Ntini.

[4] It is common cause that on 16 July 2005 Second defendant was on duty at Postmasburg. She was holding the rank of constable at the time. She was wearing her police uniform and that evening attending to complaints reported at the police station. She was the commander of the station that evening. Whilst travelling in the police van in the company of reservist Const. Jacobs (Jacobs) she received a report through the radio that there

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4. At the time when she testified she had already assumed the surname of Du Plessis.

was a fight taking place at the Boichoko Community hall. Jacobs was also wearing his duty uniform. Second defendant proceeded to the community hall. On arrival they met a certain Daddy who reported that someone was having a rifle inside the hall.⁵

- [5] Second defendant and Jacobs accompanied by Daddy walked up to the entrance of the hall.⁶ Daddy pointed at the plaintiff who was inside the hall as the person in possession of a rifle. Second defendant and Jacobs walked towards the plaintiff who was at the time standing at point “B” which was closer to the stage. The plaintiff was standing with his back against the two police officers as they walked towards him. The music was playing very loud and there were many people inside the hall. On arrival Second defendant held the plaintiff’s right hand and Jacobs held him by his left hand. Second defendant told the plaintiff to accompany them out. The plaintiff was cooperative and he walked with the two police officers towards the exit or entrance of the hall. After walking for about five paces the plaintiff suddenly broke loose from the two and stopped.

5. Daddy was one of the organisers of the event that was taking place at the hall.

6. The entrance is marked point G on the sketch plan of the scene.

- [6] Second defendant testified that she tried to grab the plaintiff’s hand but he pulled himself backward and immediately inserted his right hand under his jacket towards the top of his trousers. He took out a pistol and “cocked” it with his left hand. Second defendant testified that she then lost her memory for a while and the next moment she found herself standing on the right side of the hall, at point ‘J’. She noticed the plaintiff standing in front of her at point “L” holding a pistol with both his hands in front in a shooting position and waving it to the right and left directions. There were still many people inside the hall. Second defendant mentioned that as the plaintiff was holding this firearm waving it to the right and left she thought that he was going to shoot the people inside the hall. She was standing a distance of about 3, 1 metres from the plaintiff. She drew her service firearm and shouted at him to throw the weapon down. The plaintiff did not comply. Second defendant aimed at the plaintiff’s right arm and fired one shot. The plaintiff continued to move his hand with the firearm as he did before and in the process pointed the firearm at Second defendant. She believed that he was going to shoot her.

- [7] Second defendant then aimed at the plaintiff’s lower body and fired another shot. The plaintiff continued with his sideways movement of the hands holding the firearm. Second defendant believed that both shots that she fired had missed the plaintiff. She again fired other shots at the plaintiff until he fell down. She mentioned that all the shots she fired were aimed at his lower body as she did not want to kill him. The purpose of her firing shots was to cause the plaintiff to drop his firearm. Her intention was to save her own life as well as the lives of people inside the hall. Second defendant testified further that she could not recall if

she fired four or five shots. She had six rounds of ammunition in the magazine of her service firearm. Only one round of ammunition was found in the magazine after the incident.

- [8] Second defendant testified that as the plaintiff fell his firearm also fell next to him. According to Second defendant as she was still standing there somebody screamed to draw her attention to something? She looked at the plaintiff who was lying on the floor and realised that he was attempting to move his hand to get hold of his firearm that was next to him on the floor. Second defendant kicked the firearm further away from him. Later someone from the crowd told her to put away her firearm. She was still holding it. She placed the firearm still in a firing position in the holster that was tied to her hip on the right hand side. She phoned the police station for assistance. Warrant Officer, Niemann and another police officer came to the scene. Niemann demanded her firearm. She gave it to her. She was later taken to the police station where she was seen by a medical practitioner and a priest to assist her as she was in a shocked state. Later that night Second defendant returned to the scene where she met Inspector Fortuin. Although she cannot remember what happened she can however recall that Fortuin conducted some tests to determine the presence of “primer” on her hand.
- [9] Jacobs testified that when they arrived at the plaintiff he asked him to go with them outside. Second Defendant also spoke to him on the other side but he could not hear what she was saying. He held the plaintiff tightly with both his hands on his left palm. He could not see how Second defendant held him if she did. He mentioned that the plaintiff freed himself from him and retreated. He then grabbed the plaintiff over his upper body from behind holding his hands tightly around his body. He tried to forcibly take him out. The plaintiff was resisting. They struggled. During the struggle it happened that he looked over the plaintiff's left shoulder. As he did so his eyes were set directly on to the barrel of a firearm/pistol. He became frightened thinking that he would be shot. He immediately pushed the plaintiff away from him. As he pushed him away a shot was fired. Jacobs ran towards a wall which was about 5 paces from where he was struggling with the plaintiff for cover. As he ran he heard several shots being fired. He could not recall how many shots were fired. They were not all fired at once but intermittently. After a minute when there was no longer firing of shots he peeped from behind the wall and saw the plaintiff in the process of falling down. As the plaintiff was falling down and reached for the floor the pistol that he had in his hand also fell off his hand. The plaintiff fell on his back. At that stage Second defendant was standing on the right back diagonal position to the plaintiff. He saw the plaintiff whilst lying on his back trying to reach for his firearm and second defendant kicked it away from him. He saw a round of ammunition and an empty bullet casing on the floor next to the plaintiff. He however did not count them. He did not at any stage see the plaintiff lying on his stomach. Neither did he notice or feel any holster on the plaintiff.
- [10] During crossexamination Jacobs testified that he did not see where the plaintiff got the firearm from. He was referred to his written statement obtained by the police in which he said that after he took cover behind the wall and that he took out his firearm. He denied that

he drew his firearm and could not recall telling the police that he did so. He further denied that he heard shots being fired whilst he was behind the wall. He was also referred to an allegation in the statement that he saw the plaintiff holding the firearm with both his hands. Jacobs was further referred to his testimony in the criminal proceedings (at which the plaintiff was the accused) where he mentioned that when they arrived at the plaintiff they asked him to go outside with them and he refused after the two held him by his hands. He mentioned that the plaintiff agreed to go out with them, walked a few paces and stopped.

- [11] What was said to be the plaintiff's version was put to Jacobs. It was mentioned that Daddy pointed the plaintiff to Jacobs and Second defendant. The two told him that they wanted the firearm. The plaintiff struggled to take the firearm from his jackets inside pocket as it was tight. As he took the firearm out Second defendant immediately shot him on his right forearm. He immediately sat down on the floor and the firearm fell from his hand. He tried to stand up and he was shot on his upper arm. He stood up and tried to run away towards the toilets and was shot on his right hip/thigh area. He then fell on his stomach and as he tried to stand up he felt more shots on his back. He does not know how many shots were fired at him. The last shot made him feel as if his legs were elevated and asked the people present to put his legs on the floor. Jacobs disputed this version.
- [12] Warrant Officer Niemann who is the Second defendant's elder sister was the firearm's control officer stationed at Postmasburg. She received a telephone call from Second defendant who reported the shooting incident. Niemann arrived at the scene the same evening. She received the firearm from Second defendant. She removed the magazine from the firearm and showed Second defendant that there was still one round of ammunition in the magazine. Niemann "secured" the firearm and the round of ammunition in the chamber of the firearm fell onto the floor. She left it on the floor. She later handed the firearm at the police station to be used as an exhibit. She also noticed a firearm on the right side next to the plaintiff who was lying on his back. She took it. She found three rounds of live ammunition in its magazine and confiscated them as exhibits as well. She further noticed four bullet casings on the floor. She later showed them to the investigating officer, Warrant Officer Rhode. She also showed Rhode a bullet that was next to the wall (point Q) as well as two live rounds of ammunition. She knew nothing about the holster that was handed in as an exhibit. She noticed a blood spot on the floor where the plaintiff was lying with his feet in the direction of the stage.
- [13] Captain Rance testified that he is stationed at the ballistic unit of the SAPS at the Western Cape Forensic Science Laboratory. On 23 August 2005 he received the following items for analysis; a 9 mm RAP pistol; a Vector pistol; 3x9mm calibre fired cartridge; 2 fired bullets; 3 cartridges and 3 further cartridges. Rance conducted some forensic tests and the following were his findings: the fired cartridge casing referred to above were fired from one firearm being the RAP pistol. The same bullets could not have been fired from the Vector pistol. The two firearms were in a good working condition free of defects. He was asked under what circumstances would the firearm, such as Vector remain in a stretched/open ("oopgespan")

position. He stated that it could be because there was no ammunition left in the magazine, or the slide stop had been activated or that the pistol mechanism was defective such that the slide stop was not moving or it remained open. Rance testified further that none of the fired bullets had directly struck a wall. The two fired bullets were not fired by the Vector pistol. It was possible that the damage to the one bullet could have been caused by it striking the bone of the plaintiff or the metal part of one of the chairs inside the hall.

- [14] Dr Du Plessis testified that he, on 12 April 2010, examined the plaintiff. He noticed two wounds on the right arm, being on the right upper arm and the other one on the inside of the right forearm. The movement of the right hand was at the time normal. The radial nerve showed severe abnormal components in relation to sensory component as well as its motor component as a result of this injury to the right arm. He mentioned that the said radial nerve is responsible for the movement of the plaintiff's hand fingers which were no longer functioning normally. For the hand to hold tightly it is necessary that the brain, spinal cord, nerves, muscles and joints to function normally.
- [15] Dr Du Plessis testified that because of the injury to the radial nerve, the thumb and finger extensors were affected. The wrist muscles were not affected. The wrist muscles were functioning normally. He mentioned that for a person to hold an object tightly there must be a balance between the functioning of several muscles. The injury to the radial nerve will upset the balance and there will be overreaction to some of the muscles.
- [16] Dr Du Plessis mentioned that his examination of the right arm revealed that only one shot caused the injury to the arm; the arm was not completely straight and there was a measure of flexibility when the shot went through the arm; the injury to the radial nerve was not a straight cut injury. The nerve was partially injured and classified the injury as the lowest grade of nerve injury; the wrist muscles were still intact hence the inference that the radial nerve was possibly injured under the elbow; the injury could lead to the plaintiff losing the functioning of the thumb and fingers but the functioning of the wrist muscles was still intact. He mentioned that the injury of the muscles can be regarded as minimal.
- [17] Dr Du Plessis concluded that the injury to the radial nerve happened immediately as the shot was fired and that it hampered the normal functioning and conduct of the nerve. It would therefore mean that the muscles that are supplied or provided by this nerve would no longer function normally and would lead to the person losing control of the thumb and fingers. A person in the position of the plaintiff would therefore hold on to the firearm and struggle to open his fingers. If he held the weapon with both his hands the stronger hand would have supported the weaker hand to work against the effect of the injury. He mentioned that there is no anatomy support for the allegation that the plaintiff would have fallen immediately as a result of the wound on the arm. The wound on the arm would alone have no effect on the radial nerve. He testified that plaintiff became paraplegic as a result of the injury to the spinal cord. A person who became a paraplegic as a result of the injury to the spinal cord would immediately lose the functioning of the muscles on his lower body when he sustained that injury.

[18] The defendants tendered the evidence of Dr Dempers in order to establish the number of shots that struck the body of the plaintiff and the number of bullet tracts that were in the plaintiff's body. I now proceed to deal with the evidence.

[19] It is common cause that Dr Rene Blanco Vincent (Dr Blanco) performed an operation on the plaintiff at the Kimberley Hospital on 16 July 2005.

He was assisted by Dr Taylor . A J88 7 as well as an operation sheet were filled. The following wounds were recorded on the J88:

On right arm: 1 wound± 1x1.5 cm (possibly entry wound) lateral aspect of upper arm ±12cm above elbow. [Wound 5]

1 wound ± 1x1cm (exit wound) medial aspect of lower Right arm ±15cm underneath elbow. [Wound 6].

Right leg: 1 wound ±1x1.5cm (entry) lateral upper leg level trochanter. [Wound 7]

Abdomen: 1 wound 1x1.5cm (entry) on Right anterior axilla line below costal margin Rib 11[wound 1]. 1 wound 1x1cm (exit) Left anterior axilla line at level of post spina aliaca; [wound 3]

Back: 1 wound 1x1 cm Right side underneath area ±6 cm from spine. [Wound 4] 1 wound 1x1 cm Left side below the scalpel on level of the nipple [wound 2]

There were also two bullets: bullet 1 was removed from the plaintiff's body by Dr Blanco during the operation. Bullet 2 was discovered afterwards on the Xrays taken on his back, i.e. right spinal

7. Report by medical practitioner on the completion of a medicolegal examination.

column on the back of low lumbar column. Dr Dempers used this information by Dr Blanco to identify the wounds.

[20] Dr Dempers testified that the wound tract of the right arm show a single shot that entered and exited, meaning that there was only one shot on the right arm. Bone damage occurred at spinal column at level T11 and L4. At L4 there were bone fragments inside the spinal canal. The probability is that the tract moved through column L4 from left to right. The trajectory of the bullet was horizontal with the ground seeing that both laminae were damaged. The only bullet wound that is horizontal with this trajectory that can be linked, is the one on the side/flank of the left side.

[21] As regards vertebra T11 Dr Dempers mentioned that most fragmentation is posterior left and the anterior part of the column is relatively

intact. An object ought to have struck the column from the side or from the back seeing that there were also bone fragments inside the spinal canal. He said it was possibly the bullet that caused wound 2 that moved through T11. The tract had possibly moved lateral and high and struck the posterior aspect of column T11 got deflected and went through the soft tissue of the

back and caused damage to the kidney, liver and diaphragm and proceeded through the hip where the bullet was found. Wound 4 is according to the clothing ballistic tests an entry wound and is consistent with wound 1 through which the bullet exited the body. Wound 3 was caused by the bullet that entered the left side of the body through the soft tissue moved through Lumbale Column L4's laminae and ended on the right side of the spinal column.

[22] Dr Dempers testified that wound 7 is not an entry wound because of the absence of corresponding defects on the jeans or the shirt that plaintiff was wearing at the time of the shooting. He said a possible explanation of wound 7 is that the bullet moved from another place in the body through the tissue and broke the skin in the area of wound 7 and stopped a bit further on. The blood spot on the corresponding area of the jeans is possibly caused by wound 7. The bullet that caused wound 7 and the defect on the inside of the underwear was possibly bullet 1.

[23] According to Dr Dempers the skin lesion indicated as wound 8 differ radically from other wounds in that it is round, raised with

consistent edges and its size is half to a third compared to others. According to him it is not a wound and could be a "moesie of keloied".

[24] Dr Dempers concluded that there were only four shot wounds tracts on the plaintiff's body. There is an entry wound on the lower back (4) an entry wound left on the upper back (2); an entry wound lateral on the side(3). According to him the tracts moved from wound 2 leftwards on back to the opposite hip and end at bullet no.1; the tract from wound 3 moves from left to the right in a horizontal position and end at bullet no.2. The tract from wound 4 makes a skin movement through the soft tissue and ends lateral before the lumbar at wound 1. The tract from the arm moves from wound 5 to wound 6.

[25] In the light of the tracts referred to above Dr Dempers found the version of Second defendant to be more probable and reasonable than what was put to him as the version of the plaintiff. He demonstrated this by using a model of a human being depicting the various wounds and tracts. He testified that for wound 2 to be sustained, in the version of the plaintiff it would mean that the person who fired the shot had to do so in front of the left shoulder of a person lying flat on the ground/floor. For wound 3 it would imply that for a person lying on his back on the floor, the shooter must have his firearm on the floor next to the body. For wound 4 it would require the shooter to stand on the left side of the body and shoot through from the opposite side since the tract moves "scewly" through the soft tissue. Therefore, he concluded, if a plaintiff was lying on the floor, there was no way that all the tracts were from one central position and line.

[26] The defendants tendered the evidence of Jacobus Steyl who is a Forensic Ballistic expert. He on 08 March 2010, accompanied by second

defendant and Supt. Joubert, visited the scene where the shooting incident took place. There were some improvements made to the hall by this time. Second defendant showed him where she was standing in relation to the plaintiff when shots were fired. The distance between the two points was measured at 2.5 m. The width of the hall was measured at 10.5m and the length including the stage was 22.4m. Steyl obtained a jacket similar to the one that the plaintiff was wearing at the time of the shooting with a view to conduct tests to determine defects regarding entry and exit shots on the jackets. He covered a plastic container/ bucket with the test jacket imitating the body of a person. He then fired shots at a distance of 2.5m with a similar pistol that Second defendant used. He fired the shots at a horizontal height at the object.

[27] Steyl thereafter compared the defects on the test jacket as well as those on the jacket the plaintiff was wearing at the time of the shooting. He took photographs of the shirt, jacket and jeans that the plaintiff was wearing which were admitted as exhibits. The following were Steyl's findings:

27.1 The shirt

An exit shot defect on the right side, on the front panel, 25cm from the centre of the shirt and 23 cm from the hem of the shirt and the appearance is uneven with long ravel (Hemp1).

An entrance shot defect right below on the rear side, 20 cm from the right seam and 17cm from the hem of the shirt (Hemp 2).

An entrance shot defect on the left middle rear side, 30cm from the right seam and 38 cm from the hem of the shirt (Hemp 3).

An entrance shot defect on the left rear side, 3cm from the left seam (Hemp 4).

27.2 The Jacket

An entrance shot defect on the right sleeve, 26 cm from the upper point of the shoulder seam (jacket 1).

An exit shot defect on the inside of the right sleeve where the inner lining is stitched on the inner part of the sleeve, about 4 cm from the lower hem of the sleeve. Two holes that can be associated with an exit shot defect appear.

An entrance shot defect on the right rear right part, 20 cm from the right seam and 23cm from the hem of the jacket (Jacket 2).

An entrance shot defect on the left middle rear part, 34cm from the right seam and 40cm from the hem of the jacket (Jacket 3).

An entrance shot defect on the left rear part, 5cm from the left seam and 30cm from the hem (Jacket 4)

An entrance shot defect on the left sleeve with an accommodating tear that forms an exit shot defect. Only a shallow entrance shot hole was made and plus minus a centimetre further was the exit shot defect formed (Jacket 5).

On the right side of the jacket is a seam that is torn open between the front and rear panel of about 13cm long (Exit). This exit shot defect is associable with the exit shot defect marked "Hemp 1".

[28] A comparison of the exhibit shirt and exhibit jacket revealed the following according to Steyl:

The entrance shot defect on the upper part of the right sleeve of the jacket (jacket 2) has not caused damage on the short sleeve of the shirt.

The exit defect of the right side of the synthetic wool lining of the jacket (exit) is consistent with the exit shot defect on the right side of the shirt (Hemp 1).

The entrance shot defect on the right rear part of the jacket (jacket 1) is associable with the entrance shot defect on the right rear part of the shirt (Hemp 2).

The entrance shot defect on the left middle rear part of the "jacket 3" is associable with the entrance shot defect on the left middle rear part of the shirt (Hemp 3).

The entrance shot defect on the left rear part, "jacket 4" is associable with the entrance shot defect on the left rear part (Hemp 4).

The entrance shot defect on the left sleeve of the jacket (jacket 5) is associable with the accompanying rear of the jacket and can in all probabilities be linked with the entrance shot defect on the jacket (jacket 4). Defects marked "jacket 4" and "jacket 5" therefore could have been caused by one projectile.

There were no bullet defects appearing on the jeans but only blood spots on the right pocket part.

[29] Steyl testified that from the comparison of the entry and exit defect between the exhibit shirt and exhibit jacket, with the wounds as reflected in the J88 the following can be inferred:

The wound indicated on the right upperarm is associable with the entrance shot defect on the right sleeve of the jacket (jacket 1).

The wound on the right forearm is associable with the exit defect on the right sleeve of the jacket.

The wound on the right lower back is associable with the entrance shot defect on the right rear part of the jacket and shirt (jacket 2 and Hemp 2). The wound on the left middle of the back is associable with the entrance shot defects on the left middle rear part of the jacket (jacket 3 and Hemp 3).

The wound on the left side is associable with the right entrance shot defects on the left rear part of the jacket and shirt (jacket 4 and Hemp 4). The wound on the side of the right is associable with the exit shot defect on the side of the right side of the shirt (Hemp 1) and the exit shot defect on the synthetic wool lining of the jacket (Exit).

[30] According to Steyl bullet 1 that was found on the right hip and bullet 2 that was positioned on the right posterior on the soft

tissue against the L5 vertebra can possibly be linked with the defects as indicated as “Hemp 3” and “jacket 3”

as well as “Hemp 4” and “jacket 4” respectively. Both these bullets could possibly have impacted on vertebrae L4 and T12 respectively and lost enough energy to remain in the body.

[31] Steyl mentioned further that the bullet that caused the entry shot and exit shot defects on the right arm could possibly have been found at the scene. The bullet that caused the entry shot defect on the right rear part of the shirt and jacket respectively (Hemp 2 and jacket 2) and the exit shot defect on the right front part of the shirt (Hemp 1) could also have been at the scene. In all probabilities a total of 4 shots struck the body of the plaintiff, of which two bullets remained in the body and other two bullets should have been found at the scene.

[32] In response to the version put to Steyl that the plaintiff was shot on the arm from the front, Steyl explained that that would be inconsistent with his findings on the clothing that the plaintiff was wearing. He said the shot on the arm was from the back and that it was only one shot to the arm and that bullet moved through the right arm. There were no defects on the clothes to suggest that there was a second shot that struck the plaintiff on the arm. He further disagrees that the plaintiff was shot from diagonal position from the back on the leg. According to him no defects were found on the plaintiff's jeans to suggest that. He however agrees that three shots were fired at the plaintiff's back as indicated by defects marked “jacket 2”; “jacket 3” and “jacket 4”.

[33] On the suggestion that the 3 shots that struck the plaintiff's body were fired at the plaintiff whilst he was lying on the floor on his stomach, Steyl explained that for that to happen second defendant should have fired these shots as follows:

33.1 As regards the shot that caused defect “jacket 2’ Second defendant should have stood almost over the body of the plaintiff and fired that shot downwards in order to set that kind of trajectory.

33.2 With regard to the shot that caused defect “jacket 3” Second defendant would have stood from the front but a little towards the left of the plaintiff's body when the shot was fired.

33.3 With regard to the shot that caused “defect 4” Second defendant would have been required to have lowered herself a lot to be able to get the shot to have a trajectory that move from the right to the left through the body.

- [34] Second defendant's version that she fired the first shot at the plaintiff's right arm when she was standing in a right skewed position on his back whilst the plaintiff held his firearm with both his hands is consistent with his findings and that the shot was fired horizontally. Second defendant's further version that with regard to her second shot plaintiff turned to her direction while he was still standing and she shot him on his lower body is consistent with his finding regarding the shot that caused defect marked "exit" on the jacket. This shot moved in a horizontal direction and is also consistent with the exit shot defect marked "Hemp 1". Steyl however differs with Second defendant that this shot was fired whilst plaintiff turned towards the right in her direction. According to Steyl Second defendant must have turned around leftwards.
- [35] Steyl testified that Second defendant's version that the plaintiff thereafter turned away from her and she shot at him until he fell is consistent with Steyl's findings. According to Steyl she could still fire two shots, the third shot could damage the left sleeve of the jacket as the defect marked "jacket 5" and also damage the jacket at defect marked "jacket 4". This shot was a horizontal shot with somewhat downward inclination. Her version about her last shot and the fact that the plaintiff then fell, is consistent with Steyl's finding that this shot shows a downward impact and that the plaintiff's body is supposed to have bent backwards.
- [36] In summary, Steyl testified that all the shots could have been fired in a very short space of time while the plaintiff was still on his feet and perhaps in a falling position when the last shot was fired. He was indeed moving when the shots were fired. In Steyl's opinion the first shot was fired through the arm, after which plaintiff's body slightly moved to the left with the second shot. With the third shot there was a further movement in the same direction and thereafter the plaintiff's body turned while the fourth shot struck him. All these shots could have taken place with one movement.
- [37] With regard to what is referred to as wound no.8. Steyl testified that there is no defect that could be found on the clothes that would be consistent with such a wound. As regards Jacob's version that he held the plaintiff around his body from the back and set his eyes on the barrel of the firearm when he peeped over his shoulder, Steyl testified that that is completely possible. On the question how was it possible that the plaintiff's weapon was found in an open position ("oopgespan") after the shooting, Steyl answered that the opening system of the weapon was most probably pushed up after a shot had been fired and the locking device would stop the backward movement. He mentioned that the projectile that was found on the scene after the shooting incident is not consistent in form with a projectile that had been shot through the body of the plaintiff whilst lying down on his stomach, since such a projectile would exhibit a flat flattening due to the impact with the floor. To the contrary the projectile that was found at the shooting scene exhibits a round inward denting on the base part.

[38] Bongani Conrad Ntini testified that during July 2005 he was residing at Boichoko. He identified the jacket and shoes the plaintiff was wearing during the shooting incident as his property and that they were stolen on 15 July 2005 from his place. He denied ever handing over the firearm that the plaintiff had to him for safe keeping. He testified that it was his firearm (SP Vector) that was stolen from his place on 15 July 2005. He demonstrated that it was easy to take out his firearm from the inner pocket on the jacket even when the weapon was in the holder. He testified that his weapon had 15 rounds of ammunition when it was stolen.

Parties’

Submissions

[39] Mr Knoetze assisted by Ms A. Bester in their address analysed the evidence presented in great detail, pointing out the critical aspects of the evidence, the contradictions and their effect, probabilities and improbabilities and submitted inter alia thus:

- The events in the community hall show that the plaintiff threatened the bodily integrity of the people inside the community hall with the pistol that he had in his possession;
- That Second defendant in her capacity as a member of the SAPS was legally obliged to protect the people inside the hall against the threats of harm or death by the plaintiff;
- Second defendant was in the circumstances required to use force to prevent the imminent danger;
- The force used by the Second defendant was reasonable under the circumstances; and
- The defendants have on a balance of probabilities shown that Second defendants’ actions were at all times necessary.

[40] Mr van Niekerk who appeared on behalf of the plaintiff also analysed the evidence presented by the defendants, pointing at contradictions in the evidence, and improbabilities and submitted inter alia that:

- The facts in this case are such that it should be accepted that the plaintiff on this day acted in such a way that the bodily integrity of people in the hall was threatened;
- That the facts in this case are similar to those in *Ntamo & Others v Minister of Safety and Security*⁸ and that the only element of necessity to be considered is the question whether violence was

8. 2001(1) SA 830 (TKHC)

indeed necessary and if it was necessary whether the violence used was reasonable under the circumstances;

- That Second defendant presented no evidence as to why this option was not exercised or that it would not have had any effect;
- Second defendant was naturally obliged to fire a warning shot and she failed to do so;
- Second defendant's explanation why she could not attack and overpower the plaintiff from behind and disarm him was, to say the least, unconvincing and unsatisfactory;
- That the two police officers acted with utmost negligence when they approached the plaintiff without the necessary devices issued to them;
- That even if it could be accepted that there was a need to shoot at the plaintiff, there is no justification why the shots were fired at the plaintiff's upper body and that the only inference that can be drawn is that after the first shot was fired the Second defendant did not shoot to get the plaintiff out of action but intended to kill him. No evidence was tendered as to why was the plaintiff not shot on his legs; and
- That Second defendant used excessive force than it was necessary under the circumstances.

Mr Van Niekerk finally submitted that the defendant had failed to discharge the onus to prove that Second defendant acted lawfully and the defendants should be found to be liable for the damages to be proved by the plaintiff.

Analysis

- [41] The issue that require determination is whether the defendants have succeeded to show on a balance of probabilities that Second defendant was justified under the circumstances to shoot at the plaintiff in defence of herself and members of the public inside the community hall and/or whether she was obliged to act by virtue of being a member of the SAPS. Furthermore, if it is found that she was obliged to act whether the violence she used was reasonable under the circumstances. The legal position was succinctly put by Madlanga AJP in *Ntamo and Others v Minister of Safety and Security*⁹ as follows:

"For private defence (as defence is often called) to succeed, certain

9. Supra at para [21]; See also *Ntsomi v Minister of Law and Order* 1990(1) SA 512 (C) at 526H; Ex parte: *Die Minister van Justisie: In re S v van Wyk* 1967(1) SA 488(A) at 497H, 509CD.

requirements must be met. In this case only two are relevant and I deal only with them. To state something trite, where the threatened harm can be avoided without the use of force, private defence cannot succeed. Where force is necessary to neutralise the threat of harm, the force must not be more than is reasonably necessary to achieve that purpose (the proportionality principle or doctrine see *R v Molife* 1940 AD 202 at 204; *R v Attwood* 1946 AD 331 at 340). The view that I take of the facts of this case is that what needs to be determined is whether the use of force was necessary at all and, if it was necessary, whether the force used was not excessive (i.e. was it

proportional to, or commensurate with the threatened harm).”

[42] For the defendants to benefit from the application of the principle, they had to establish that there was an unlawful attack or threatened attack on Second defendant or other persons or that there was imminent physical danger to them; that the use of violence was necessary to avert that attack or physical danger; and that the violence used was reasonable under the circumstances. The test applicable to determine whether Second defendant’s conduct is justifiable is an objective test.¹⁰

[43] In view of the fact that the plaintiff did not tender any evidence, this matter must be determined on the basis of the factual matrix supplied by the defendants together with the expert evidence presented to the Court. In dealing with the expert evidence I will be mindful of the following remarks by Davis J in *Schneider v AA11* :

“In short, an expert comes to court to give the court the benefit of his or her expertise. Agreed, an expert is called by a particular party, presumably because the conclusion of the expert, using his or her expertise, is in favour of the line of argument of the particular party. But that does not absolve the expert from providing the court with as objective and unbiased an opinion, based on his or her expertise, as possible. An expert is not a hired gun who dispenses his or her expertise for the purposes of a particular case. An expert does not assume the role of an

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10. *S v Goliath* 1972(3) SA 1 (AD) at 11F; *S v Ntuli* 1975(1) SA 429 (AD) at 436DE; *S v Motleleni* 1976(1) SA 403 (A) at 406 C; *S v Ngomane* 1979(3) SA 859 (A); *S v Shikunga & Another* 2000(1) SA 616 (NmS).
 11. 2010(5) SA 203 (WCC) at 211I212B.

advocate, nor gives evidence which goes beyond the logic which is dictated by the scientific knowledge which that expert claims to possess.”

[44] In light of the concession on behalf of the plaintiff that his conduct without any doubt threatened the lives and/or bodily integrity of those around him, it shall not be necessary to restate the detailed facts surrounding his conduct. It shall suffice to state that he was held by the two police officers by his hands, and were all moving out of the hall and he suddenly stopped, freed himself from them and produced a firearm. It must also be accepted that Jacobs grabbed him over his body from behind and as he set his eyes on the barrel of the plaintiff’s firearm, he became frightened, pushed plaintiff aside and fled for cover. In the process a shot was fired from the plaintiff’s firearm. From this moment, Second defendant who had lost her memory temporally, acted. Given these circumstances, the logical conclusion is that police intervention was necessary.

[45] The question that must be considered is what would a reasonable police officer in the position of Second defendant have done seeing the plaintiff wielding a firearm in a shooting position. This is the same question that the Court in *Ntamo’s* case had to consider. The facts

in Ntamo were briefly as follows. The deceased was a passenger on a bus. Whilst on the journey he became embroiled in an argument with other passengers. When the bus reached one of the bus ranks on its route, the deceased grabbed one of the passengers and slapped him while pointing a cocked firearm at him. The bus stopped at the bus rank and the driver of the bus alighted and rushed to the police station where he reported the incident. It was common cause that when the driver was on his way to the police station he heard a

shot. The same shot was heard by the police at the police station. Four policemen were assigned to attend to the problem. Three of them were wearing police uniform and had R5 automatic rifles. They were led by a sergeant who was wearing civilian clothes and having a 9mm pistol. On approaching the bus the three uniformed police officers took up positions in a semicircle in relation to the bus at a distance of about 16 paces. The deceased had already disembarked from the bus and had a pistol held aloft. As planned the team leader found his way to the deceased on the belief that the deceased would mistake him for a member of the public. He introduced himself to the deceased as a police officer, showed him his appointment certificate. He took the deceased's hand that held the pistol, put it over his shoulder and instructed him to drop the pistol behind him. The deceased did not heed such order, and pushed the police officer who was smaller than he was aside. The police officer ran for cover fearing that the deceased would shoot at him. The three police officers who took up positions fired repeatedly at the deceased until he fell down.

[46] The medical practitioner who conducted the post mortem examination on the body of the deceased found that the latter sustained two fatal wounds to the right chest and various other entry and exit wounds. The probable cause of death was bleeding in the chest. Both the Court a quo as well as the Supreme Court of Appeal found the evidence of the police witnesses as to what happened after the team leader approached the deceased confusing and riddled with contradictions. There was uncertainty as to whether the deceased fired one or two shots, if he fired at all and at whom such shot or shots were supposedly fired. "The SCA concluded thus:

"In my view, no finding can be made, on the evidence of the three policemen---Constable Msebi did not testify and the bus driver said he could not see anything as he was behind the policemen --- even in the absence of any evidence on behalf of the respondents, that their lives or the public were in danger at the time that they shot and killed the deceased. It follows that the appellant failed to discharge the onus resting on him to prove that the fatal shooting of the deceased was justified."

[47] As I have pointed out the plaintiff relied heavily on the facts and reasoning of the Courts in Ntamo and urged this Court to find that the respondents had failed to discharge the onus of proving that the plaintiff's shooting by Second defendant was justified. A point was made that as it was remarked by the trial court in Ntamo, the Second defendant failed to fire a warning shot as required. The circumstances of this case differed from Ntamo on this and other crucial aspects that will be shown later. In Ntamo, the deceased had disembarked from the bus and was in an open area where members of the public were some distance away. It need to be mentioned that the trial court's remarks regarding the warning shot were

made on the basis of a finding that the police should not have approached the deceased as they did. The court found that instead of resorting to violence, the police should have resorted to other reasonable forms of intervention. One of these was for the uniformed police to call out to him and give him instructions from a distance and watch out for his response. This method was found easier for the police to adopt because of the many motor vehicles present at the scene which was a parking area. Only in the event of the desired response not forthcoming from the deceased, the police could have fired a warning shot. One of the police officers who testified conceded that this method was an option.

[48] In this case the incident took place inside a hall full of people. The firing of a warning shot would have placed the lives of people inside the hall in danger. Furthermore, Second defendant had ordered the plaintiff to drop his firearm and he did not comply. He instead continued to wield the firearm in a shooting position. In addition, he continued to hold onto the firearm after he was shot on the hand. The firing of a warning shot was therefore in my view an option that was not feasible under the circumstances.

[49] The criticism that Second defendant should have grabbed the plaintiff from behind and disarm him is in my view without merit. Already

Jacobs had grabbed the plaintiff with a view to overpower him and did not succeed. He left him when he set his eyes on the barrel of his firearm and fled. It shows that the firearm was pointed at him whilst he held the plaintiff. Furthermore, Second defendant explained that she could not attempt to grab him from behind because he was moving sideways with a cocked firearm and could possibly shoot her or members of the public. It was dangerous to try to grab him. She was also smaller than him and she was unassisted at the crucial moment. Her explanation is in my view reasonable and satisfactory.

[50] A point was also made that Second defendant was negligent in not having in her possession items such as handcuffs, teargas and a baton which had been issued to them as members of SAPS. She conceded that she was negligent in not having these items in her possession. However, her negligence in not having these items does not in my view make the shooting unjustified. She explained that she could not use the teargas canister inside a hall full of people because it would affect them all. It will also be unreasonable to defend oneself and the public with teargas, a baton or handcuffs against a person having a firearm. The absence of these items does not mean that the Second defendant unnecessarily used violence for defence.

[51] The evidence of Second defendant that she did not intend to kill the plaintiff but merely to disarm or put him out of action, and that she at all times aimed at his lower part of the body remain unchallenged and there is no reason not to accept it. The first shot was directed at the right arm. Only when the plaintiff did not respond thereto and when Second defendant believed that she missed him that the second and subsequent shots were fired. This aspect also distinguishes this case from the facts in Ntamo where the police armed with automatic rifles fired at the deceased on his chest. In Ntamo the police had more firing power than the

deceased and they all four of them used it. In casu only Second defendant had to deal with the situation.

[52] I agree with the submissions on behalf of the defendants that the contradictions between the evidence of Jacobs and Second defendant

have no bearing on the question whether Second defendant acted in defence of herself and members of the public. These contradictions

are inter alia, the fact that Second defendant in her evidence in chief said she fired 4 or 5 shots whereas during cross examination she said it should have been 4 shots because a round of ammunition was found in the firearm when it was secured; that in the criminal trial she regarded herself not as a good shooter whereas during this trial she regarded herself as a good shooter; that at the criminal

trial she said plaintiff freed his left hand from Jacobs, and cocked the firearm with it whereas in this trial she said she did not see plaintiff free himself from Jacobs but assumed that he did because Jacobs held his left hand and used the same hand to cock the firearm; that although she said she did not shoot the plaintiff from a top position downwards but that she may have fired the third and fourth shots when the plaintiff was in the process of falling down; that her evidence differ from that of Steyl when she says that the plaintiff had turned to the right when the second shot was fired whereas Steyl's findings were that he must have turned to the left. It is correct that there are contradictions but they do not detract from the fact that Second defendant acted in defence of herself and other members of the public.

[53] Reference was also made to the contradictions relating to Jacobs' evidence in the criminal trial and what he said in this Court. The main aspect is that at the criminal trial Jacobs said he touched the plaintiff on the shoulder and asked him to accompany them outside and the plaintiff refused and under cross examination in this Court he testified that they requested the plaintiff to accompany them outside and whereupon the plaintiff moved with them for a short distance and stopped and refused to move further. That at the criminal trial Jacobs testified that the plaintiff's weapon was pointed at the roof when a shot was fired, whereas during cross examination he testified that it was pointed at the top part of the wall at the entrance side and that he later said that he actually could not see to which direction was the firearm pointed but only inferred. These contradictions have no bearing on the question whether Second defendant acted in self defence. The plaintiff was present in Court throughout the trial (except on the day when arguments were presented) and elected not to tender evidence about what happened.

[54] This is not a case where one could say that the police acted without a proper plan. Unlike in Ntamo, the plaintiff was not wielding a firearm when the police arrived. They approached him and he gave full cooperation by agreeing to accompany them outside. He was aware that he was dealing with the police and was not being attacked by civilians. He decided to withdraw his cooperation and draw his firearm. I doubt that a reasonable police officer would have foreseen that the plaintiff was going to withdraw his cooperation and act as he

did. From the moment he drew his firearm, a dangerous situation was in existence and the police had to act urgently. It would be unreasonable to criticize the actions of Second defendant, with the benefit of hindsight, to say that the plaintiff had all the time to shoot at the police or other people inside the hall and did not do so. What would have been a reason for him to free himself from the police, draw a firearm and cock it, if not to use it? Had the plaintiff injured any of the people inside the hall Second defendant would have been criticised for shirking her responsibilities and not

act as required of a police officer in her position and First defendant would have been liable for any damages suffered.

[55] I find that both Second defendant and Jacobs were reliable witnesses. They gave good impression to the Court. Each one gave an independent account of what happened. They did not attempt to tailor their evidence for it to be free of contradictions. Such contradictions are expected seeing that things happened quickly in a noisy hall full of people. Ntini's evidence is only relevant as to his ownership of the firearm that was possessed by the plaintiff and how it got missing and is not relevant to the events in the hall.

[56] As regards the expert witnesses I am satisfied that they testified according to their professional skills and gave an independent

account of their conclusions. They corroborated each other materially. Their conclusions are also to a great extent consistent

with the factual matrix. Their opinions were objective, unbiased and logical.

[57] I am satisfied that the circumstances inside the community hall were such that the plaintiff acted in such a way that the bodily integrity and lives of people were in danger and that Second defendant as a member of SAPS had to intervene as she did and the violence she used to avert the danger was reasonable. The respondents have therefore succeeded to discharge the onus resting on them that the shooting of the plaintiff by Second defendant was reasonable under the circumstances. The plaintiff's action should therefore be dismissed with costs. The defendants should be commended for the employment of two counsel. Such a move is a positive contribution towards addressing the gender transformation challenges of the legal profession in this country. However, this is not a case where the plaintiff should be ordered to carry the costs of two counsel.

Order

[58] In the result the following order is made:

Plaintiff's action is dismissed with costs, such costs not to include the costs of employment of the second counsel.

L P Tlaletsi

Judge: Northern Cape High Court.

Appearances:

On behalf of the Plaintiff: Adv J van Niekerk SC

Instructed By: Haarhoffs Inc

On behalf of the Respondent: Adv Knoetze SC and Adv A Bester

Instructed by: State Attorney

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2Rules for regulating the conduct of the proceedings in the several Provincial and Local Divisions of the Supreme Court of South Africa.

3. Mabaso v Felix 1981(3) SA 865(A) at 874BE. Minister of Safety and Security v Ntamo and Others 2003(1) SA 547 (SCA) at par. [3].

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